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No. 10-752

IN THE
Supreme Court of the United States

DUSTIN DRESSNER,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN REPLY TO OPPOSITION

G. BEN COHEN*
BIDISH SARMA

THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

**Counsel of Record for Petitioner*

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

BRIEF IN REPLY TO OPPOSITION 1

I. The State's Brief Repeats the Lower Courts' Erroneous Assertion that Statistical Evidence and Historical Evidence Have No Bearing at *Batson*'s Third Step 2

II. The State Continues to Employ Implausible and Fantastic Justifications, and Ignores the Revealing Side-by-Side Analysis of Similarly-Situated African-American and White Jurors 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986).....*passim*

Miller-El v. Cockrell, 537 U.S. 322 (2003).....*passim*

Miller-El v. Dretke, 545 U.S. 231 (2005) .....*passim*

Snyder v. Louisiana, 552 U.S. 472 (2008).....1, 5

Miscellaneous

Brief of Louisiana Association of Criminal Defense Lawyers, as Amicus Curiae Supporting Petitioner 1, 2

BRIEF IN REPLY TO OPPOSITION

Dustin Dressner hereby submits this Brief in Reply in support of his petition for a writ of certiorari, filed December 2, 2010.

The State's *Brief in Opposition* [hereinafter "*BIO*"] does not dispute Petitioner's assertion that this is an important case, worthy of consideration. Nor does it address the *amicus* brief filed by the Louisiana Association of Criminal Defense Lawyers which observed that this is a significant issue, and that there is a recurring problem in the Louisiana courts where prosecutors' peremptory strikes against African-Americans uniformly survive appellate review, no matter how much circumstantial evidence of discrimination the defendant presents. Instead, the State defends the Louisiana Supreme Court's *Batson* ruling on its merits, implicitly conceding that this issue warrants review.

Petitioner's reasons for granting the writ remain uncontested: the Louisiana Supreme Court has not heeded the guidance this Court provided in *Snyder* and *Miller-El*. Instead, it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." This case presents a timely opportunity to ensure that *Batson* retains vitality.

The Louisiana Supreme Court's opinion stands for the proposition that the race-neutrality of a prosecutor's step-two explanations suffices once and for all at step-three of the process. In defending that opinion, the *BIO* confirms the view that statistical and historical evidence is irrelevant to the

third-step determination; exalts explanations that applied to prospective white jurors the State did not strike; and disregards record-bound evidence demonstrating the State's dissimilar treatment of African-American and white jurors. Race is the only reasonable explanation for the State's strikes. The *BIO* replicates the Louisiana's courts' legal-gymnastics to avoid that conclusion.

I. The State's Brief Repeats the Lower Courts' Erroneous Assertion that Statistical Evidence and Historical Evidence Have No Bearing at *Batson*'s Third Step

The *BIO* asserts that the Louisiana Supreme Court sufficiently considered statistical evidence because it affirmed the trial court's finding of a *prima facie* case. *See BIO* at 11 (citing Pet. App. 91A, fn.8). This argument epitomizes the lower courts' error, which the *amicus* described clearly. *See Amicus* at 13 ("Instead of looking beyond the four corners of a case to determine whether stated reasons are false, the Louisiana Supreme Court determines that the stated reasons are not false so that it does not have to look beyond the four corners of the case."). Statistical evidence is not only relevant to the step-one determination, but also to the finding at step-three of *Batson*.

At trial, the State struck seven of nine qualified African-American jurors. As this Court made clear in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Miller-El v. Dretke*, 545 U.S. 231 (2005), statistics like these provide powerful evidence

bearing on the ultimate question of whether strikes were racially motivated.

In addition to ignoring the step-three relevance of statistical evidence, the State claims that the historical evidence of discrimination in Jefferson Parish was neither relevant nor properly presented. However, the Louisiana Supreme Court decided the claim on the merits, effectively holding that the race-neutrality of the State's reasons necessarily overrode the significance of history.[1] *See* Pet. App. B at 134A. As with its analysis of statistical evidence, the Louisiana Supreme Court's approach undermines *Miller-El*, and renders it impossible to prove a *Batson* violation unless the prosecutor fails to articulate any race-neutral explanation for her peremptory strike.

Under the Louisiana Supreme Court's opinion, historical evidence, statistical evidence, and comparative juror analysis cannot establish a *Batson* violation; the only evidence that could prevail in response to a race neutral explanation at step-two would be direct evidence of discrimination.

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[1] The historical evidence was properly presented to the trial court at the hearing on the *Motion for New Trial*. The trial court heard and rejected the Petitioner's renewed *Batson* claim.

II. The State Continues to Employ Implausible and Fantastic Justifications, and Ignores the Revealing Side-by-Side Analysis of Similarly-Situated African-American and White Jurors

Petitioner argued that the prosecutor's claims that he struck prospective African-American jurors because of their pro-State characteristics were implausible and pretextual.[2] The State responded, "it cannot be maintained that jurors who express a reluctance . . . to follow the law are expressing a view that is pro-State. Instead, such statements provide ample grounds for concluding that a [person] may not make a very good juror." *BIO* at 10.[3]

However, the State fails to explain why it peremptorily challenged 88% (seven of eight[4]) of the African-American jurors who initially indicated that they may hold against the defendant his exercise of

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[2] These pro-State characteristics include a desire to hear the defendant testify in his own defense and an initial reluctance to accord the defendant his presumption of innocence.

[3] None of the peremptorily-stricken African-American jurors were removable for cause, despite any initial reservations they expressed about the Fifth Amendment.

[4] The State gave the Fifth Amendment as a reason for its strikes against Ms. Parker, Mr. Holloway, Mr. Woods, and Mr. Ratcliff, who all made some indication that they would want to hear from the defendant or want him to put on a case. The State also struck Ms. Frazier, Ms. Patterson, and Ms. Garrett who all suggested they would also want to hear from the defendant. R. 2118, 2125, 2323.

his Fifth Amendment rights, but struck 0% of the white jurors (zero of six[5]) who provided a similar response. Not only did the State fail to strike similarly situated white jurors, but it also objected to defense cause-challenges to white jurors who indicated they may be unable to meaningfully consider mitigating circumstances.[6] The *BIO* provides no explanation – nor could it – concerning the State's conflicting efforts to strike African-Americans who provided pro-State answers and to protect similarly-situated whites from defense cause-challenges. These contrary actions provide clear evidence of discriminatory intent.

The Louisiana Supreme Court and *BIO* fail to conduct or engage with the comparative juror analysis outlined in *Snyder* and *Miller-El*. This analysis reflects disparate treatment of prospective African-American and white jurors: a side-by-side analysis of Selina Paul and Karen Rine makes plain that the only basis for striking Ms. Paul and not Ms. Rine was race. *See Petition for Certiorari* at 29-30. Much like this Court's comparison between Mr. Brooks and Mr. Laws in *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008), the contrast establishes the

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[5] Ms. Monie and Ms. Barhorst both indicated that they would want to hear from the defendant. Additionally, Mr. Hendrickson, Mr. Munch, Ms. Diket, and Mr. Robles expressed that they would be curious if someone did not defend himself at trial. R. 2129, 2135, 2198, 2320, 2373

[6] *See* R. 1589-92 (Frank Hendrickson); R. 2417 (Frank Noto and Shane Cotham).

implausibility of the State's explanations. Ms. Rine – not Ms. Paul – was the only juror to whom all four of the State's reasons for striking Ms. Paul actually applied: she circled the letter "D"; she would have trouble considering mercy; she was confused during voir dire; and she volunteered information to defense counsel.

The *BIO* acknowledges – as the Louisiana Supreme Court recognized – that the trial prosecutor mischaracterized Ms. Paul's responses and struck her, yet allowed Ms. Rine to serve. *See BIO* at 14 ("the record admittedly does not support the prosecutor's statement that Ms. Paul said she could not consider mercy"). But, like the Louisiana Supreme Court, the *BIO* suggests that the error has no bearing in the step-three analysis. While the State's candor concerning the deficiency of the prosecutor's explanation should be applauded, its silence on its ultimate relevance underscores the indefensibility of the trial prosecutor's explanations.

CONCLUSION

The petition for a writ of certiorari raises an important question, and should be granted. This Court should summarily reverse the Louisiana Supreme Court's opinion based on the clear error committed below.

Respectfully submitted,

G. Ben Cohen*
Bidish Sarma

The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

*Counsel of Record for Petitioner